Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Petition of the Wireless Consumers	)	
Alliance, Inc. for a Declaratory Ruling on	)	WT Docket No. 99-263
Communications Act Provisions and FCC	)	
Jurisdiction Regarding Preemption of State	)	
Courts from Awarding Monetary Damages	)	
Against Commercial Mobile Radio Service	)	
Providers for Violation of Consumer	)	
Protection or Other State Laws	)	

To: The Commission

EX PARTE COMMENTS OF THE WIRELESS CONSUMERS ALLIANCE, INC.

The Wireless Consumers Alliance, Inc. ("WCA") hereby files these Ex Parte Comments in response to the recent ex parte filings of SBC Wireless, Inc. and AT&T/BellSouth and in further support of its petition that the Commission declare that neither the Communications Act nor the Commission's jurisdiction requires the preemption of monetary relief under State consumer protection, contract or tort laws.

INTRODUCTION

Although deregulation of CMRS providers has benefited consumers, it has also been accompanied by an explosion of consumer fraud.[1] Unlawful and deceptive conduct "distorts the telecommunications market because it rewards companies who engage in deceptive and fraudulent practices by unfairly increasing their customer base at the expense of those companies

[1] "**It is beyond dispute** that there have been – and are still pending – a large number of lawsuits raising state law false advertising, fraud and other claims for damages." SBC Wireless, Inc. *ex parte* comments, p.7, 6/30/00. (Emphasis added).

that market in a fair and informative manner and do not use fraudulent practices."[2] A long-standing and well established remedy for such unlawful conduct has been monetary damages assessed by State courts for violation of consumer protection, contract and tort laws. "Without the possibility of obtaining redress through collection of damages" these laws are "virtually meaningless."[3]

The barrage of eleventh-hour filings by the industry is a thinly veiled attempt to foster confusion on the issue of consumer rights clearly presented to the Commission in WCA's petition.[4] At this critical juncture of the Commission's proceedings on the Petition, confusion serves only to delay a bright-line ruling at the expense of consumers who are left without redress for the deceptive practices of certain wireless service providers. The absence of a remedy for consumers who are deceived by deceptive business practices is the antithesis of the free market model.

ARGUMENT

A good starting point in any well-founded analysis of this issue is the regulatory scheme that was in effect prior to the adoption of the Preemption Clause. At that time, CMRS service was regulated by the States as a "telephone service." Before offering intrastate telephone service, a CMRS provider first had to secure a certificate that such service was required by the public convenience and necessity ("CPC&N"). This involved State commission review of the

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[2] *Second Report and Order and Further Notice of Proposed Rulemaking*, 14 FCC Rcd 1508, ¶ 1.

[3] *In the Matter of Implementation of Sections 3(n) and 332 of the Communications Act Regulatory Treatment of Mobile Services*, GN Docket No. 93-252, 9 FCC Rcd 1411; 1994 FCC LEXIS 1444,; 74 Rad. Reg. 2d (P& F) 835. Paraphrase from ¶ 186 discussion concerning the need for damages as part of the Commission's complaint remedy.

[4] On June 30, 2000, SBC Wireless, Inc. ("SBC") filed additional *ex parte* comments which discuss the recent court decisions of Bastien v. AT&T Wireless Services, Inc., 205 F.3d 983 (7th Cir. 2000) and Ball v. GTE Mobilnet of California, 2000 WL 739415 (Cal. Ct. App. June 8, 2000). On the same day, AT&T Wireless Services ("AT&T") and BellSouth Cellular Corp. ("BellSouth") filed a notice of *ex parte* presentations to members of the Commission's staff about Ball and Union Ink Co., Inc. v. AT&T Corp., BER-L-8974-99 (Sup. Ct., N.J., June 9, 2000). On July 12, 2000, AT&T/BellSouth filed further ex parte papers which contain a copy of the court's decision on reconsideration in Ball. SBC and AT&T/BellSouth contend that these cases support their argument that the

proposed facilities and a determination of the adequacy of the service ("grade of service") to be provided thereby to the public. Rates for intrastate CMRS service were thereafter controlled through a rate setting process supervised by the State commission. Such rates were based on a fixed rate of return on investment on utility plant plus costs of operations and were set forth in filed tariffs.[5]

This sort of regulation was appropriate when such service could only be provided on a monopoly or limited competition basis. However, when the Commission adopted rules which made effective competition possible between CMRS providers then the reason for regulating market entry by requiring a State CPC&N and regulating rates by filed tariffs disappeared.[6] It was this State regulatory paradigm which Congress sought to dismantle with the Preemption Clause. To wit: "no State or local government shall have any authority *to regulate* the *entry of* or the *rates charged* by any commercial mobile service, except that this paragraph shall not prohibit a State from regulating the other terms and conditions of commercial mobile service" (the Preemption Clause, emphasis added).

A. The rationale of the "filed rate doctrine" does not apply.

The rationales of the filed rate doctrine are to ensure nondiscriminatory rate setting and agency autonomy in rate setting without court interference. Under this antiquated, judge created doctrine, consumers are presumed to know the rates filed with the Commission. However, the Commission has exercised its authority to deregulate CMRS rates "in order to maximize market

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Preemption Clause has displaced monetary remedies under State consumer protection, contract and tort laws. We disagree.

[5] See: *Competitive Carrier, Further Notice of Proposed Rulemaking*, 84 FCC 2d 445 (1981) for a description of the elements of the rate of return regulatory paradigm.

[6] "Government regulation of telecommunications companies serves as a substitute for competition in the marketplace." *Law and Regulation of Common Carriers in the Communications Industry*, Brenner, p.5.

competition" and has refused to accept tariff filings from CMRS providers.[7] And, in the present deregulatory environment as this Commission has found, the application of the "filed rate doctrine" undermines legitimate business expectations and harms consumers.[8]

Nevertheless, AT&T/BellSouth state in their ex parte of July 12, 2000 that "a court that is preempted from regulating a wireline carrier's rates because of the filed rate doctrine is also preempted from regulating a wireless carrier's rates under the Preemption Clause."[9] This argument implicitly mixes two unrelated statutes. CMRS providers are provided the same limitation of liability protection as provided to wireline companies under State tariffs which generally limit liability for negligence in providing service.[10] The Preemption Clause does away with State "regulation . . . [of] the rates charged" by CMRS providers. It is simply a non sequitur to say that because the wireline carriers are rate regulated by the States and these rates cannot be altered by court money judgments therefore CMRS providers' deregulated rates are entitled to the same treatment under an extension of the limitation of liability for negligence laws.

There is a principle of jurisprudence which comes into play at this point which is that the court will look beyond the form of the complaint to reach the substance of the claims. Thus, a court will look through "artful pleading" and "labels" placed on causes of action to determine the true nature of the complaint. Applying this principle in Central Office Telephone[11] lead the court to conclude that the complaint in that case that service quality is poor was really *an attack on* rates in derogation of *AT&T's filed tariff*. SBC and AT&T/BellSouth leave out the words "filed tariff" to argue that this case stands for the proposition that an attack on CMRS service is an

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[7] *In the Matter of Implementation of Sections 3(n) and 332 of the Communications Act Regulatory Treatment of Mobile Services*, 9 FCC Rcd 1411; 1994 FCC LEXIS 1444,; 74 Rad. Reg. 2d (P& F) 835 (1994).
[8] *Second Report and Order, In the Matter of Policy and Rules Concerning Interstate, Interexchange Marketplace*, 11 F.C.C. Rcd. 20, 730, ¶ 55.
[9] Ex parte at ¶ 6.
[10] Wireless Communications Act and Public Safety Act of 199, Page 113 STAT. 1286, Public Law 106-81, 106th Congress.

attack on CMRS rates. The next proposition in this false chain of logic is that since there can be no interference by the courts of a "regulated" rate through the award of money damages there can be no judgment which affects a "deregulated" rate.

This is not the only example of misuse of the language from the filed rate doctrine cases. SBC cites *Arkansas v. Louisiana Gas Co. v. Hall*[12] for the proposition that "a breach of contract claim regarding the purchase of **federally rate-regulated** natural gas" amounts to "nothing less than the award of a retroactive rate increase." Both SBC and AT&T/BellSouth cite *Wegoland Ltd. v. NYNEX Corp.* which dismissed "a fraud-related claim challenging the rate of several telephone companies" whose rates are contained in a filed tariff. These rate regulated cases are inapposite to unregulated market rates which are not set by any commission and not filed in tariffs with the commensurate presumption of public notice.

B. State damages awards are *not* rate setting.

At every turn the CMRS providers argue that calculating damages will involve the court into determining a "reasonable rate." Damages are the most important legal remedy. In general, compensatory and punitive remedies are used by the courts to redress injury caused by violation of consumer protection, contract and tort laws.[13] The general objective of compensatory damages is to restore the plaintiff to the position he or she would have occupied if the unlawful act had not occurred. Punitive damages are intended to prevent a defendant from profiting from its wrong and are used to deter unlawful conduct. Damages must be proven and found based upon factual evidence presented to a court. There is simply no basis for the argument that a court will be called upon to determine a "fair" price for CMRS service in awarding damages.

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[11] *AT&T Corp v, Central Office Telephone, Inc.*, 524 U.S. 214 1998).

[12] Ex parte page 10.

[13] See *Black's Law* Dictionary, Fifth Edition, under "Damages" for a description and definition of the various categories of damages.

Awards which are simply based on what a judge felt was "fair" will not stand.[14] The measure of damages is a matter of proof based on the facts of the individual case.

C. In Bastien the court employed the substance v. form analysis to determine that the complaint was really a challenge to market entry and to the reasonableness of the refund for dropped calls.

In Bastien the District Court dismissed the complaint which said that AT&T Wireless should not have been permitted to offer service in Chicago, Illinois until it had fully built out its PCS system. Plaintiff subscribed to AT&T's PCS service in August of 1998. The complaint was filed in December of 1998. "The actual language of the Complaint identifies ***no promise, misrepresentation or omission*** that AT&T Wireless allegedly made. Instead, the Complaint focuses exclusively on AT&T Wireless's entry into the market while its infrastructure was allegedly inadequate ... and the charges or rebates for `dropped' calls." (AT&T brief,[15] p. 6, emphasis added). The 7th Circuit agreed and said:

> "Scrutinizing Bastien's complaint more closely, we note that the complaint alleges `misrepresentation' and `concealing' **but does not offer specific instances of the words used by AT&T Wireless that would qualify as such**. Rather we are left with facts suggesting AT&T Wireless had not sufficiently build up its network and the bare conclusory allegation that this constituted misrepresentation and fraud. That is not adequate to earn the plaintiff the protection of the well-pleaded complaint rule." [16]

In its discourse concerning the Preemption Clause, the Bastien court discussed the case of a "similar situation" in the case of Long Distance Litigation, 831 F.2d 627, 633-34 (6th Cir. 1987). In that case, "[b]ecause the *claims for fraud and deceit* would not have affected the federal regulation of the carriers at all, the court held that Congress could *not* have intended to *preempt* the claims."[17] The court concluded that it need not reach this issue because "***Bastien's***

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[14] United States v. Hatahley, 257 F. 2d 920 (10th Cir. 1958).
[15] Attachment "A".
[16] 205 F.3d 938, 989 (emphasis added).
[17] 205 F. 3d at 988 (emphasis added).

complaint directly attacks AT&T Wireless's rates and its right to enter the Chicago market."[18] SBC is simply incorrect in stating that the court found that these claims were "an indirect attack on the cellular provider's rates."[19] SBC's proclamation that "Bastien says that a state law claim alleging breach of contract and consumer fraud against a cellular provider is preempted"[20] is fictitious nonsense. Bastien is an example of a court looking through "artful pleading" and the "labels" placed on causes of action to determine the substance of the complaint. In doing so, the court cites other court decisions, including Central Office Telephone, which stand for the proposition that the "court may look beyond face of the complaint" to determine the true nature of the action. The Bastien court properly concluded that the complaint directly attacked AT&T's right to enter the market and the reasonableness of its credit for dropped calls and rejected the "bare conclusory allegation that this constituted misrepresentation and fraud."[21]

D. In Ball the court employed the substance v. form analysis to determine that the complaint was a challenge to how CMRS rates were calculated and rejected the remedy sought by plaintiff to have the court fix the method of rate computation.

In Ball the plaintiffs claimed that CMRS charges for non-communication time violated State law prohibitions on unfair business practices. Plaintiffs requested the court to issue a permanent injunction to prevent the CMRS defendants from charging for non communication periods.[22] The court refused, saying that the relief requested "directly challenge[d] the way defendants calculate the length of a cellular call" in violation of the Preemption Clause.[23] The court declined to engage in this process. The court said, however, that the Preemption Clause

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[18] *Id.* (emphasis added).
[19] Page 4.
[20] Page 3.
[21] See Footnote 10, supra, at 215.
[22] 96 Cal. Rptr. 2d 805. AT&T/BellSouth say that on reconsideration that "the court stated that injunctive relief would constitute a sufficient remedy." (letters of 7/12 to the Commissioner's legal advisors). However, in context, the courts statement is about the period of time before the effective date of the Preemption Clause. [See Attachment "B" which is a redline version of "page 22" of the courts decision – 96 Ca. Rptr. 2d 801, 810, and a complete copy of the published decision, as modified.]

"does not preempt a plaintiff from maintaining a state law action in state court for an alleged failure to disclose a particular rate or rate practice."[24] Plaintiffs were granted leave to amend their complaint accordingly.

E. The examples given by SBC and AT&T/BellSouth in their ex parte presentations where they assert that the Preemption Clause does not apply are inconsistent with their arguments.

SBC concedes that breach of contract claims may be enforceable under state law and gives the following example: "[I]f a CMRS provider's **contract** with a customer stated that CMRS would bill its customers on a per-second basis, and that each second would be billed at the same rate, and established a per-second rate – and yet the CMRS provider still billed its customers on a rounded-up, per-minute basis – judicial action might be warranted."[25] If however, SBC says, the CMRS provider fraudulently deceived the customer into believing that a lower rate would be charged then a State court monetary remedy would be preempted by the Preemption Clause.[26] Compare Union Ink where AT&T conceded that "cases alleging false advertising with respect to billing practices or services such as rounding up are not preempted because they do not attack the adequacy of the infrastructure [or] the sufficiency of service."[27]

How would damages be calculated in these examples? The basic principle of damages is restoring the plaintiffs to their rightful position. Thus, in the SBC example, the plaintiff would be entitled to recover the difference between the price charged and the contract price. What is the difference between the contract price case and one in which the customer was deceived by the CMRS provider into believing that a lower price would be charged? Is it that in the first instance the CMRS provider set the price and in the second example it used fraud to deceive the

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[23] *Id.* at 808.] There the Court deleted the text cited by SBC at p. 5 and 7.
[24] *Id.* at 810, emphasis added.
[25] At page 18, emphases added.
[26] *Id.*

consumer concerning price? Is that what the Preemption Clause is all about? We think not. In the AT&T example, their argument that falsely telling consumers that they would be billed in whole minute increments is actionable but falsely representing the grade, or quality of service, is not, simply doesn't follow.

It is not how the services are priced nor how the systems are designed that is the question in State unfair business practice cases. It is the false representations, the illegal business practices, the deceit and deception practiced by members of the CMRS industry concerning, *inter alia*, their charges and services, that have drawn an outpouring of consumer complaints. These practices are likely to continue for as long as the CMRS industry can act with disdain for the State consumer protection, contract and tort laws under the guise that they are immune from the consequences of violating these laws.

F. Commission action is needed to prevent the deceptive and disingenuous arguments made by CMRS providers which mislead courts into making erroneous decisions which harm consumers.

We have attached a copy of the transcript[28] in Union Ink because the argument presented there by AT&T is the same argument which caused us to file a petition for declaratory relief before this Commission. All of the causes of action in Union Ink are "based on the difference between the service ***as represented or promised*** and the quality of service actually received." (AT&T, TR 5, emphasis added). In moving to dismiss on the grounds that these claim were preempted by the Preemption Clause, **Counsel for AT&T[29] argued as follows:**

(1) "The FCC regulates CMRS Rates".

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[27] TR 19.

[28] Attachment "C".

[29] Local counsel for AT&T was accompanied by "Howard Spear, Senior Attorney with AT&T Corporation and James Grant, Senior Corporate Counsel with AT&T Wireless." TR 4. Thus, it cannot be assumed that the statements made to the court were simply uniformed or unintentional representations.

"The Federal Communications Commission is charged with, by Statute, evaluating the reasonableness of the rates." (TR 21). "What's the difference in the price of that service between the ***FCC-approved rate*** and what the plaintiffs ***were either promised or represented or received***? That gets [the court] right into rate regulation." (TR 27, emphasis added).

(2) **"The FCC regulates CMRS grade of service".**

"AT&T Wireless [is in] compliance with [the] FCC's infrastructure regulations." (TR 7). "[T]here is clearly a regulatory expertise being implicated here." (TR 27). Therefore: "if the gravamen of the false advertising claim is directed at service or infrastructure, then inevitably the court is drawn into the type of analysis that is preempted by section 332." (TR 20).

These statements are false. The Commission does not regulate CMRS rates nor does it make any determination whether or not the CMRS infrastructure is adequate to provide any prescribed grade of service to the public.[30] However, the court in Union Ink, believing that the FCC regulates rates and grade of service, concluded that state causes of action which "touch[..] on market entry and rates" are preempted. (TR 37). As the court remarked, preemption of state laws may result in "a terrible outcome" and be a "hardship on plaintiff" but "it simply is a result of our Federal system of authority." (TR 38).

G. The argument that the growth and development of CMRS enterprises is dependent upon immunity from state consumer protection, contract, and tort laws is absurd.

SBC claims that awards of damages for violation of state laws against fraud and unfair business practices will "undermine .. nationwide single rate plans."[31] The simple answer to that argument is CMRS providers can avoid damage awards by not engaging in fraudulent or

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[30] "98. In the various wireless communications services we currently license within Commission-defined geographic areas (e.g., Cellular, PCS, 900 MHz SMR) we prescribe limits on the strength of signals licensees may provide at the borders of their service areas." *In the Matter of Amendment of Part 90 of the Commission's Rules To Provide for the Use of the 220-222 MHz Band by the Private land Mobile Radio Service, Implementation of Sections 3((n) and 332 of the Communications Act, Regulatory Treatment of Mobile Service, Implementation of Section 309(j) of the Communication Act* 11 FCC Rcd 188 (1995). Thus, a CMRS provider can go into business with a single cell operating on a single channel if it wishes to do so.

[31] At page 19.

deceptive practices that are prohibited by State law. Even if there is an ostensible increase in transaction costs for the CRMS providers, such costs are justified to ensure that consumers have basic protections, provided in other business transactions, that make sure companies cannot engage in unlawful or unfair business practices without facing any liability for those actions. This is especially important in the rapidly expanding and volatile telecommunications marketplace where there is a long and growing record of abuse of consumer rights by CMRS providers. CMRS providers who do not engage in unfair or deceptive business practices need not be concerned that damage awards will stifle growth of their businesses. The most effective method for CMRS provides to avoid continued complaints and escape liability for deceptive business practices is simple: tell the truth.

CONCLUSION

Without damages, the state consumer protection, contract and tort laws are "virtually meaningless."[32] A grant of the WCA petition will mean that CMRS providers will no longer be able to make misrepresentations to consumers, engage in unfair business practices or deceptive conduct, breach their contracts or engage in tortious conduct and then hide behind the Preemption Clause as a defense to their unlawful behavior.

Respectfully submitted,

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[32] Footnote 6.